Supreme Court, U.S.
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No. 94-568

In The

Supreme Court of the United States

October Term, 1994

MILLARD McKINNEY,

Petitioner,

vs.

OSCEOLA COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NEAL D. BOWEN
Counsel of Record
County Attorney
Osceola County Board of County Commissioners
17 South Vernon Avenue
Room 112
Kissimmee, Florida 34741
(407) 847-1212

LEWIS E. SHELLEY
HENRY, BUCHANAN, MICK, HUDSON & SUBER, P.A.
P.O. Box 1049
Tallahassee, Florida 32301
(904) 222-2920

Attorneys for Respondent

6058
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

ARGUMENT

The Petition for Writ of Certiorari does not raise a novel issue, and the decision of the United States Court of Appeals for the Eleventh Circuit does not conflict with any decision of the Supreme Court.

The statement of case, including all necessary material facts, is succinctly set forth in the *en banc* decision of the United States Court of Appeals for the Eleventh Circuit.

Although this Court has not specifically addressed substantive due process in the state employment context, it has offered several guideposts. The substantive component of the Due Process Clause of the Fourteenth Amendment is designed to prevent the government from using its vast powers for the purpose of oppression. *Collins v. City of Harker Heights*, __ U.S. __, 112 S. Ct. 1061 (1992); *Daniels v. Williams*, 474 U.S. 327 (1986). Substantive due process protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Rights enumerated in the Bill of Rights are fundamental and also certain other unenumerated rights such as the right of privacy. *Planned Parenthood v. Casey*, __ U.S. __, 112 S. Ct. 2791 (1992).

This Court has repeatedly stressed the narrow scope of the substantive due process. In *Moore v. City of East Cleveland*, 431 U.S. 492, 502 (1977), this Court cautioned against extending this protection beyond the Bill of Rights. More recently, this Court rejected the argument that substantive due process protects a governmental employee's right to a safe work environment based on the reluctance to broadly extend the protection. *Collins v. City of Harker Heights*, __ U.S. __, 112 S. Ct. 1061, 1068 (1992). ("The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.")

Coupled with this explicit reluctance to extend the

substantive due process protection to any rights other than those constitutionally created fundamental rights is this Court's disinclination to involve the federal courts in reviewing routine state employment decisions. In *Bishop v. Wood,* 426 U.S. 341 (1976), a police officer claimed his termination deprived him of both a property interest and a liberty interest. The Court determined that neither interest had been raised and concluded with a strong statement that state employment decisions are not subject to substantive due process analysis:

> The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 350.

Since this Court has not squarely dealt with the issue of substantive due process for state created employment rights, it is not surprising that the federal circuits have not uniformly treated this issue. However, this has not led to any clear dichotomy among the federal circuits. Decisions from the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have indicated that state created property interests in employment have no substantive due process protection. *See, e.g., Huang v. Board of Governors of University of North Carolina,* 902 F.2d 1134 (4th Cir. 1990), *Sutton v. Cleveland Board of Education,* 958 F.2d 1339 (6th Cir. 1992); *Kauth v. Hartford Insurance Co. of Illinois,*

852 F.2d 951 (7th Cir. 1988); *Lum v. Jensen,* 876 F.2d 1385 (9th Cir. 1989); *Mangels v. Pena,* 789 F.2d 836 (10th Cir. 1986). While the Fifth and Eighth Circuits acknowledge a "substantive due process" right in continued employment, the availability of a prompt post-termination hearing forecloses a substantive due process cause of action. *Schaper v. City of Huntsville,* 813 F.2d 709 (5th Cir. 1987); *Weimer v. Amen,* 870 F.2d 1400 (8th Cir. 1989).

Although the First, Second, and Third Circuits have recognized the possibility of a substantive due process right, no substantive due process claim is usually found. *See, e.g., Coyne v. City of Somerville,* 972 F.2d 440 (1st Cir. 1992); *Copeland v. Philadelphia Police Dept.,* 840 F.2d 1139 (3rd Cir. 1988); *but see, Gargiul v. Tompkins,* 790 F.2d 265, 273 (2nd Cir. 1986). ("Considerations of privacy clearly influenced the ... determination of arbitrariness.")

In addition, the relative infrequency that the issue has been raised in the various circuits over the past ten years justifies denying the Petition for Writ of Certiorari. Except for the now over-ruled decisions from the Eleventh Circuit, circuit court decisions upholding a substantive due process claim in the state employment context are rare.

Although the Petitioner raised only a substantive due process claim at trial, the Eleventh Circuit treated his complaint as a procedural due process concern and found no claim was stated. The Petition for Writ of Certiorari should be denied because *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny *Hudson v. Palmer,* 468 U.S. 517 (1984), was properly applied to the circumstances presented in this case. The Petitioner's alleged procedural deprivation is action taken by an alleged "biased" board. Any bias conduct was clearly not sanctioned by the state. More importantly because acts of bias by their very nature are intentional and unpredictable, the state cannot in any relevant sense anticipate and meaningfully guard against them. Therefore, unauthorized and intentional acts of bias resulting in an alleged

procedural due process violation are controlled by the *Parratt* doctrine. Only by failing to provide a means to correct the alleged bias would the state violate procedural due process. *Parratt,* 451 U.S. at 544.

Petitioner urges that the Petition for Writ of Certiorari be granted because of confusion created by this Court's opinion in *Zinermon v. Burch,* 494 U.S. 113 (1990). Moreover, Petitioner argues that *Zinermon* applies broadly to prevent the application of the *Parratt* rule to these facts: (1) because the Board itself had the authority to effect the deprivation and also had the power to provide a pre-deprivation hearing; and (2) because a pre-deprivation hearing was in fact held, the Petitioner argues it was obviously "feasible."

Petitioner's argument, however, is incorrect because it attempts to impermissibly broaden the application of *Zinermon.* First, unlike *Parratt,* the specific conduct causing the deprivation in *Zinermon* was not "random and unauthorized." *Id.* at 138. In this case the alleged deprivation was based on a state actor's intentional act of bias. As in *Hudson* where the state could not anticipate when a guard would intentionally and maliciously destroy a prisoner's property, the state in this case cannot anticipate and control unauthorized and intentional acts of bias. Therefore, since bias conduct is neither foreseeable nor predictable, the doctrine of *Parratt* is applicable to this case.

The Petitioner's argument that since a pre-termination hearing was provided, "feasibility" is presumed and thus dispositive on the *Parratt* issue, misinterprets the significance of the "impossibility" language found in *Zinermon.* It was clearly recognized in *Zinermon* that any pre-deprivation process is not effective when a state actor is "bent upon effecting the substantive deprivation and would have done so despite any and all pre-deprivation safeguards." *Id.* at 137. As in *Hudson,* where it would have been absurd to suggest that the state hold a hearing to determine whether a prison guard should maliciously destroy a prisoner's property, it would be both absurd and ineffective to

establish a procedural requirement that attempts to prevent a biased board member, indifferent to guaranteed protections, from effecting the alleged deprivation. Because a pre-deprivation hearing needed to address the risk of this kind of alleged deprivation is "impracticable," the *Parratt* doctrine clearly applies.

The "adequacy" of McKinney's state court remedy is relevant if this Court concludes that the case raises only procedural due process issues and the doctrine of *Parratt* applies. The Petitioner argues that merely because the state court's review of the administrative proceeding is limited to the record the Florida process is inadequate. However, as recognized by the Eleventh Circuit, when reviewing the administrative record, the Florida courts have both the authority to order the relief requested, *i.e.*, a new hearing conducted by a fair tribunal, and the duty to determine whether procedural due process is properly accorded.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

NEAL D. BOWEN
Counsel of Record
County Attorney

LEWIS E. SHELLEY
HENRY, BUCHANAN, MICK,
HUDSON & SUBER, P.A.

Attorneys for Respondent